LEOPAD HOLDINGS SDN BHD v. ASIAN SHIELD WAREHOUSING SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
SURAYA OTHMAN JCA
[CIVIL APPEALS NO: B-02(IM)(NCVC)-1977-09-2018 &
B-02(IM)(NCVC)-1978-09-2018]
20 DECEMBER 2019

COMPANY LAW: *Liquidation – Company wound up – Undischarged bankrupt – Undischarged bankrupt as concerned contributory sought sanction to enable company to commence civil proceedings – Whether undischarged bankrupt ought to obtain prior sanction of Director General of Insolvency to directly or indirectly take part in management of company in liquidation – Whether entire board of directors ceased and became functus officio once company wound up – Whether entire management and running of wound up company in hands of liquidator – Whether undischarged bankrupt had locus – Whether undischarged bankrupt had competency to apply for sanction – Insolvency Act 1967, s. 38(1)(d) – Companies Act 2016, ss. 2, 486, 492 & 503*

COMPANY LAW: *Winding up – Liquidation – Concerned contributory – Undischarged bankrupt as concerned contributory sought sanction to enable company to commence civil proceedings – Whether undischarged bankrupt ought to obtain prior sanction of Director General of Insolvency to directly or indirectly take part in management of company in liquidation – Whether entire board of directors ceased and became functus officio once company wound up – Whether entire management and running of wound up company in hands of liquidator – Whether undischarged bankrupt had locus – Whether undischarged bankrupt had competency to apply for sanction – Insolvency Act 1967, s. 38(1)(d) – Companies Act 2016, ss. 2, 486, 492 & 503*

The respondent ('plaintiff') purchased from PNSB Properties Sdn Bhd ('PNSB') a piece of land with a factory built on it. The plaintiff agreed with the appellant's ('defendant') offer to purchase the said land for RM24,000,000. The defendant paid the 3% earnest deposit amounting to RM720,000 which sum was acknowledged by the plaintiff. The defendant was then given vacant possession of the land pending execution of the sale and purchase agreement. All utilities and rates were to be borne by the defendant from the date of vacant possession. Subsequently, the defendant was informed by the plaintiff that the transaction had stalled and new terms were proposed. As the defendant had been occupying the said land without any payment of rental or consideration for more than nine years and the defendant being uncooperative, the plaintiff commenced several actions. Suit 609 was the current suit filed by the plaintiff against the defendant. The defendant's application to amend its defence and to include its counterclaim

was allowed. The defendant then filed an application to strike out the plaintiff's writ of summons and statement of claim (first application) which was dismissed. The defendant's application to stay the proceedings was also dismissed. Subsequently, the defendant filed an application for security for costs *vide* encl. 38. The defendant also filed a second application to strike out the plaintiff's writ of summons and statement of claim *vide* encl. 50. The trial judge dismissed both the applications in encl. 38 and encl. 50. Hence, this appeal against the decision for encl. 50. In support of encl. 50, the defendant contended that the sanction obtained by the plaintiff was invalid as the applicant *ie*, the contributory of the plaintiff (Devi Suppiah) was a bankrupt ('the concerned contributory') and had no *locus* to apply for sanction for the plaintiff company. It was further contended that the express provision of s. 38(1)(d) of the Bankruptcy Act 1967/Insolvency Act 1967 ('BA/SA') makes it mandatory for the contributory, who was an undischarged bankrupt, to obtain the previous or prior sanction of the Director General of Insolvency ('DGI') or the court, *inter alia*, to directly or indirectly take part in the management of the plaintiff company who was in liquidation. It was also an issue that the concerned contributory's act of applying the sanction to enable the plaintiff to proceed with the suit against the defendant was an act amounting to directly or indirectly taking part in the management of the plaintiff company. The plaintiff, on the other hand, invoked the operation of the doctrine of *res judicata* to bar the present application (encl. 50) by reason of a previous striking out application (first application) filed by the defendant which was dismissed with costs. The trial judge appeared to be in agreement with the position taken by the plaintiff and dismissed the defendant's encl. 50. The issue that arose was whether the concerned contributory who was an undischarged bankrupt did not have the *locus* to apply for sanction for the company unless she herself had the previous or prior sanction of the DGI.

Held (dismissing appeal with costs)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) Once a company is wound up, the property, assets and rights of the company are vested with the liquidator. Only the liquidator has the right to bring an action (subject to the argument on the absolute agreement). A liquidator can grant sanction to a creditor or contributory under s. 486 and the Twelfth Schedule of the Companies Act 2016 ('CA 2016') to commence or defend an action. (para 41)

(2) The activity or conduct of the concerned contributory, an undischarged bankrupt at the time she applied for the sanction, did not come within the meaning of entering or carrying on any business either alone or in partnership. She proceeded to obtain sanction for the plaintiff's company merely to commence an action against the defendant. The concerned contributory was an ex-director and was a shareholder by

virtue of her 500,000 fully paid shares (out of 2.5 million issued and paid up shares) holding in the plaintiff company. Though fully paid she was still a contributory as defined under s. 2 of the CA 2016. As a contributory, she could, *inter alia*, apply for stay of the winding-up order under s. 492 of the CA 2016, or apply to question the exercise of powers by the liquidator under s. 486 of the same. (paras 45, 52 & 53)

(3) If she initiated such an action in court, which would invariably involve some financial implication, the sanction of her trustee *ie*, the official assignee would come into play. But if she, in her capacity as a contributory, applied to the liquidator, more so the official liquidator (and not to court), *per se* for sanction for the company's proposed civil action, it could not be said that she was involved, directly or indirectly in the management of the plaintiff company on account, that once a company is wound up the entire board of directors would cease and become *functus officio*. The said solitary act of the concerned contributory did not amount to being directly or indirectly involved in the management of the company. (paras 54 & 55)

(4) The entire management and running of the wound-up company was now in the hands of the liquidator. She (the bankrupt contributory) would only be involved if invited by the liquidator for certain purposes as provided in the CA 2016 or take part in the public examination under s. 503 of the same. It was beyond imagination to say that such involvement would amount to or would be considered as being directly or indirectly involved in the management of the wound-up company. (para 56)

(5) Reading s. 38(1)(d) in the context of its setting, *inter alia*, Part II of the BA/SA, the company in which the concerned contributory was said to be directly or indirectly concerned in or take part in its management must refer to a going concern or a solvent company. Hence, the status of the plaintiff's company as a wound-up company is material and having serious determinative implication on the issue raised by the defendant. Once a company is wound up, the management, *ie*, the entire board of directors, was *functus officio*, and the same being taken over by the liquidator. Henceforth, the winding-up company is prohibited from carrying out any business except for the beneficial winding up of the company. (para 61)

(6) There was no basis to sustain the defendant's contention that the concerned contributory had no *locus* to apply for sanction for the plaintiff company. The concerned contributory was not affirming an affidavit nor holding herself out as director or officer of the company in any affidavit or cause papers to support the company's action in court. There was no issue that the contributory had no competency to apply for the said sanction. She had the competency and she did not have to

obtain the prior sanction of the DGI or previous sanction of the DGI. On the facts and law, she had passed the legal threshold to procure the said sanction. The action was thus proceeded upon a valid sanction. Further, the trial judge's approach in dealing with the issue of *res judicata* was entirely correct. (paras 62, 63 & 65)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606 HC ***(refd)***

Commissioner for Corporate Affairs (Vic) v. Bracht [1988] 14 ACLR 728 ***(dist)***

Sri Hartamas Dvept Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***

Tan Wee Hun v. Inchape Equatron (M) Sdn Bhd [1998] 5 CLJ 769 HC ***(refd)***

Ting Yuk Kiong v. Mawar Biru Sdn Bhd [1995] 3 CLJ 136 HC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), ss. 125, 236

Companies Act 2016, ss. 2, 198, 486, 492, 503, Twelfth Schedule

Insolvency Act 1967, s. 38(1)(a), (d)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), O. 23 r. 1(2A), O. 92 r. 4

Companies (Victoria) Code [Aus], s. 227(1)

Other source(s) referred to:

Chan & Koh on Malaysian Company Law Principles & Practice, p 969

Khoo's Law and Practice of Bankruptcy in Malaysia, 2nd edn, p 1

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For the respondent - S Ravichandran & Lee Shu Min; M/s Seah Balan Ravi & Co

[Editor's note: For the High Court judgment, please see Asian Shield Warehousing Sdn Bhd v. Leopad Holdings Sdn Bhd [2017] 1 LNS 1811 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JCA:

[1] Civil Appeal No. B-02(IM)(NCVC)-1977-09/2018 ("Appeal 1977") is the appellant's (defendant) appeal against the decision for encl. 50.

[2] Enclosure 50 is the appellant's application to strike out the respondent's (plaintiff) writ of summons and statement of claim dated 28 October 2016 under O. 18 r. 19(1)(a), (b) and /or (d) ROC 2012 and/or under the court's inherent jurisdiction. The learned judge had dismissed encl. 50. Hence Appeal 1977.

[3] Civil Appeal No. B-02(IM)(NCVC)-1978-09/2018 ("Appeal 1978") is also the appellant's appeal in respect of the decision for encl. 38.

[4] Enclosure 38 is also the appellant's application, now for security for costs of RM100,000 to be paid by the respondent and the respondent's contributory, Devi a/p Suppiah, to this court within seven days under O. 23 r. 1(2A) and/or O. 92 r. 4 of ROC 2012. The learned judge had also dismissed encl. 38. Hence Appeal 1978.

[5] On 25 January 2019, this court had allowed the appellant's application for the consolidation of the said two appeals.

[6] For the purposes of this judgment, the parties will be referred to as they were in the High Court. Hence, the appellant will be referred as the defendant and the respondent as the plaintiff.

[7] On the appointed date of the hearing of the consolidated appeals, the defendant had elected to proceed only with Appeal 1977.

The Facts In Brief

[8] The plaintiff had purchased from PNSB Properties Sdn Bhd ("PNSB") a piece of land with a factory built on it, held under H.S.(D) 116405, P.T. No. 231, Bandar Sultan Sulaiman, Klang, Selangor. The sales and purchase agreement for the same was dated 21 December 2005.

[9] On 12 February 2010, the plaintiff had agreed with the defendant's offer to purchase the said land for RM24,000,000.

[10] The terms and conditions of the said sale were narrated by the plaintiff's former solicitor's letter (Messrs Arifin Raj De Silva) dated 12 February 2010, encompassing:

(i) the sale is subject to the approval of the relevant authorities;

(ii) the payment of 3% of the purchase price as earnest deposit and the balance of 7% must be paid upon signing of the sale and purchase agreement, to complete the initial deposit;

(iii) the sale and purchase agreement must be signed within 14 days of obtaining the State Authority's approval;

(iv) the balance purchase price must be paid within three months and an addition of one month; and

(v) the defendant will be given vacant possession of the said land upon payment of the 10% deposit.

[11] The defendant duly paid the 3% earnest deposit amounting to RM720,000, which sum was acknowledged by the plaintiff.

[12] The defendant was then given vacant possession of the land pending execution of the sale and purchase agreement.

[13] All utilities and rates were to be borne by the defendant from the date of vacant possession.

[14] On 26 April 2011, the defendant was informed by the plaintiff's new solicitor (Messrs A Farah Zubir & Partners) that the transaction had stalled and new terms were proposed:

(i) only 4 acres of the said land were on sale. It does not include the option for the remaining 6.2 acres of land;

(ii) the purchase price of the land to be reduced from RM24 million to RM17 million;

(iii) the defendant shall be liable to pay quit rent and assessment rates on the land since the defendant had occupied the land without payment of rental since 2010; and

(iv) the defendant's solicitors are to forward a draft sale and purchase agreement within three weeks from the date of acceptance of the revised offer.

[15] Pursuant to further discussions between the parties, the plaintiff *vide* their solicitor's letter dated 21 June 2011, further proposed the reduction of the purchase price of the land to RM15,500,000.

[16] Rentals will be imposed upon execution of the sales and purchase agreement.

[17] Still further, the plaintiff, through their solicitor, subsequently informed the defendant's solicitor that PNSB had withdrawn the offer to sell the remaining 6.2 acres of the land and had requested for further instructions from the defendant.

[18] The defendant did not respond.

[19] On 12 September 2012, the plaintiff, through their solicitor, gave notice to the defendant that rental will be imposed retrospectively for the occupation of the said land, effective April 2012.

[20] As the defendant had been occupying the said land without any payment of rental or consideration for more than nine years and the defendant being uncooperative, the plaintiff had commenced the following actions throughout the years:

(i) Originating Summons No: 24-1642-12/2012 wherein the plaintiff had filed an action *vide* OS against the defendant. The defendant then filed an application to convert the OS into a writ. On 21 March 2014, the defendant's application was granted by the court with costs of RM2,500 to be paid by the defendant to the official receiver.

(ii) Suit No: BA-22NCVC-282-05/2016 (suit 282). The plaintiff then filed an action against the defendant *vide* suit 282. However, the plaintiff's writ of summons and statement of claim was struck out upon the defendant's application with costs of RM4,000 to be paid by the plaintiff's contributory to the defendant.

(iii) Suit No: BA-22NCVC-609-11/2016 (suit 609). This is the current suit filed by the plaintiff against the defendant. The defendant's application to amend its defence and to include its counterclaim was allowed on 25 July 2017.

The defendant then filed an application to strike out the plaintiff's writ of summons and statement of claim (first application). This was dismissed on 12 September 2017. The defendant's application to stay the proceedings was also dismissed on 8 December 2017.

Subsequently, the defendant filed an application for security for costs (*vide* the present encl. 38). The defendant also filed a second application to strike out the plaintiff's writ of summons and statement of claim (*vide* the current encl. 50). The learned judge had subsequently dismissed both the applications in encl. 38 and encl. 50 on 21 September 2018.

[21] In support of encl. 50, the defendant contended that the sanction obtained by the plaintiff on 21 October 2016 is invalid as the applicant, ie, the contributory of the plaintiff (Devi a/p Suppiah), is a bankrupt (hereinafter referred to as "the concerned contributory") and has no *locus* to apply for sanction for the plaintiff's company.

[22] It was further contended that the express provision of s. 38(1)(d) of the Bankruptcy Act 1967/Insolvency Act 1967 ("BA/SA, 1967") makes it mandatory for the contributory who was an undischarged bankrupt to obtain the previous or prior sanction of the Director General of Insolvency ("DGI") or court, *inter alia*, to directly or indirectly take part in the management of the plaintiff company who was in liquidation.

[23] It was also an issue that the concerned contributory's act of applying the sanction to enable the plaintiff to proceed with the suit against the defendant is an act amounting to directly or indirectly taking part in the management of the plaintiff company.

[24] On the other hand, the plaintiff contended that there is no provision in law that states that a contributory who is a bankrupt must first obtain sanction before he or she could obtain sanction for the plaintiff's company which has been wound up to commence this action.

[25] The plaintiff also invoked the operation of the doctrine of *res judicata* to bar the present application (encl. 50) by reason of a previous striking out application (first application) filed by the defendant which was dismissed with costs and upheld by the Court of Appeal.

A **The Decision Of The Learned Trial Judge**

[26] The learned trial judge appeared to be in agreement with the position taken by the plaintiff and dismissed the defendant's encl. 50 application. At pp. 23, 24 of rekod rayuan tambahan ("RRT"), the learned trial judge in his grounds of judgment stated:

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> [10] It was crucial to note that in the present instance, the bankrupt contributory ("Devi") who applied for sanction on behalf of the plaintiff company that was in liquidation did not seek to commence or maintain any action herself but for the company to maintain the present action. Hence, strictly speaking, her competence or otherwise to bring or maintain
C this action would not be in issue.
>
> [11] On the whole upon considering the provisions of the relevant laws, and the various pronouncements from several authorities referred to the Court, I upheld the plaintiff's contention that there is no clear requirement and/or provision in the Bankruptcy Act, 1967 and/or Companies
D (Winding-Up) Rules 1972 and/or Companies Act, 2016, which states explicitly that a bankrupt is required to apply for sanction first before he/she can apply for sanction for a wound up company to commence an action, which the contributory did in this case.

[27] On the issue of *res judicata*, the learned trial judge, in his grounds of
E judgment, laid down the bare facts in paras. 12, 13, 14, at pp. 24, 25 of the RRT and in para 15, His Lordship finally concluded that:

> [15] Under the circumstances alluded to, considering the trite principle that the *res judicata* rule applies also to subsequent stages of the same proceedings even though the second application is based on grounds different from those in the former application, the doctrine of *res judicata*
F would operate in favor of the plaintiff in this instance.

The Appeal Before Us

[28] Learned counsel for the defendant argued that the concerned contributory who was an undischarged bankrupt did not have the *locus* to
G apply for sanction for the company unless she herself had the previous or prior sanction of the DGI.

[29] It was further submitted that the commencement of legal proceedings, the pursuit or defending of an appeal, in essence, are to "directly or indirectly take part in the management of a company" for the purposes of s. 38 of the
H BA/SA, 1967. Hence the proper sanction must be the sanction issued under s. 38(1)(d) of the Act and not as found by the learned trial judge in para. 10 p. 23 of RRT (reproduced above at para. 26). It was submitted that the learned trial judge erred in coming to such findings.

I **[30]** It was also the submission that the learned trial judge erred when he found as in para. 11 of his grounds of judgment, at p. 23 of RRT (reproduced at para. 26, above), that there is nothing in the BA or other relevant laws

which states explicitly that the bankrupt contributory is required to apply for sanction first before she can apply for sanction for a wound-up company on account that the decision to commence an action involved supervisory control of the management of the company that it cannot be said not to be directly or indirectly taking part in the management of the company within the purview of s. 38(1)(d) of BA/SA, 1967, thus requiring the previous sanction of the DGI.

[31] It was also the basis of the defendant's appeal that the sanction cannot be granted retrospectively to the contributory.

[32] The defendant further argued that the learned trial judge erred when he placed the burden on the defendant to have ascertained the bankruptcy status of the concerned contributory at the commencement of the suit instead of the plaintiff making full and frank disclosure of the same. The plaintiff's failure to disclose the bankruptcy of the concerned contributory had deprived the defendant from raising the same in their first application to strike out the plaintiff's writ and statement of claim.

[33] In response, learned counsel for the plaintiff reiterated his position that there is no provision in law that the concerned contributory must first obtain sanction before she could obtain sanction for the plaintiff's company which has been wound up to commence this action.

[34] It was further submitted that s. 38(1)(d) of the BA/SA, 1967, applies only to solvent company, whereas here the plaintiff company was in liquidation. Hence, the liquidator will run and manage the company. Every single decision will be decided by the liquidator, leaving no room for the involvement of the concerned contributory in the management of the company either directly or indirectly. The authorities relied by the defendant were all in relation to solvent companies, which has no application in the present appeal. In addition, the concerned contributory is not making a personal claim. The claim is instituted by the company. She had only applied for the sanction to enable the plaintiff's company to commence legal proceedings against the defendant.

[35] On the duty to disclose the bankruptcy status of the concerned contributory, learned counsel submitted that the concerned contributory was made a bankrupt on 6 December 2013. She was already a bankrupt when the first application to strike out the plaintiff's suit was filed. Her bankruptcy was within public domain and her status could easily be found in the Bankruptcy Search System maintained by Jabatan Insolvensi Malaysia ("Mdl"). Reasonable diligence by the defendant would have easily revealed the status of the contributory.

[36] Further, the concerned contributory only used a standard form issued by Mdl to apply for the sanction and not a statutory form which requires affirmation before a Commissioner for Oaths.

[37] As such, it was submitted that in all the circumstances of the case, the concerned contributory owes no duty to disclose her bankruptcy status to any of the parties herein.

Our Decision

[38] There is no dispute that the concerned contributory was at all material times an undischarged bankrupt.

[39] There is also no dispute that the concerned contributory was an undischarged bankrupt when she applied for sanction for the wound up plaintiff's company to initiate proceedings against the defendant.

[40] There is also no dispute that the concerned contributory had applied for the said sanction under s. 38(1)(a) of the BA/SA, 1967 (- see p. 93, Jilid 1, Rekod Rayuan (RR)).

[41] It is also trite law as pointed out by the learned trial judge that once a company is wound up, the property, assets and rights of the company are vested with the liquidator. Only the liquidator has the right to bring an action (subject to the argument on the absolute assignment). The liquidator can grant sanction to a creditor or contributory under s. 486 and the Twelfth Schedule of the Companies Act 2016 (previously s. 236 Companies Act 1965) to commence or defend an action.

[42] However, as noted earlier, the concerned contributory in this case was an undischarged bankrupt at the time she applied for the sanction.

[43] The corresponding issue is whether the concerned contributory had correctly applied for the sanction under s. 38(1)(a) of the BA/SA 1967 or rather the sanction applied or issued under s. 38(1)(d) should be the appropriate one.

[44] The relevant s. 38(1)(a) and 38(1)(d) of the BA/SA provides:

> 38. Consequences of refusal of discharge.
>
> (1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;
>
> ...
>
> (d) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company.

[45] The concerned contributory's activity or conduct did not come within the meaning of entering or carrying on any business either alone or in partnership. Neither did she aspire to become a director of any company nor

was she in pursuit of an action for damages in respect of an injury to her person. She proceeded to obtain sanction for the plaintiff's company merely to commence an action against the defendant. Can her conduct then be construed as otherwise directly or indirectly to take part in the management of the plaintiff's company within the ambit of s. 38(1)(d)?

[46] Learned counsel for the defendant brought our attention to the decision of the Supreme Court of Victoria in *Commissioner for Corporate Affairs (Vic) v. Bracht* [1988] 14 ACLR 728, where the court delved on the meaning of "directly or indirectly take part in the management of a company" in the context of bankruptcy as follows:

> "Take part in" and "being concerned in" should be given wide definition. They would include activities involving some responsibility and participation in the decision making processes of the company but do not extend to routine clerical or administrative duties associated with management.
>
> ... any person who in the affairs of the company exercises supervisory control which reflects the general policy of the company for the time being which is related to this general administration of the company is in the sphere of management. He need not be a member of the board of director. If he fulfils a function which touches the central administration of the company, that is sufficient ... .

[47] Nevertheless, the above-said case is clearly distinguishable. There, the accused, who was allegedly acting as a director or participated in the management of a company while being an insolvent, was prosecuted for an offence under s. 227(1), Companies (Vic) Code which makes it an offence for an insolvent to act as a director or be in any way (whether directly or indirectly) concerned in or take part in the management of a corporation without leave of the court (equivalent to our s. 198 Companies Act 2016, s. 125 Companies Act 1965). It is germane to note that the company in the above case ie, Helti Pty Ltd is a going concern corporation and not under liquidation. Our present case is pole apart in that the concerned contributory is not being prosecuted for an offence under s. 198 Companies Act 2016 or s. 125 Companies Act 1965, and, the respondent company is not a going concern company. Thus, the factual matrix of the *Bracht*'s case (*supra*) is clearly not at par with our present case under appeal.

[48] We would adopt the above expression of principle in "the *Bracht*'s" case as being applicable in the context of the meaning of "directly or indirectly take part in the management of any company" in our s. 38(1)(d) of the BA/SA, 1967, in so far as a going concern company is concerned, it being an expression of a general principle. We would nevertheless find it appropriate to bear in mind the following rider of Ormiston J in *Bracht*'s case (p. 738):

> What ought to be added however, in addition to my earlier attempt to show what is the constituent elements of this offence, is that in a two year period, as is comprehended by the charge in the information, some

A regard ought to be had to the frequency with which the respondent carried out managerial function or was otherwise concerned in the management of the company. An incidental delegation to, and performance by, the respondent of the task of negotiating the rent or the amount and type of credit, if subject to direction and approval, may not amount to being concerned in the company's management, but consistent
B or at least regular involvement in that type of task, *albeit* mixed with the performance of routine work, may well suffice, even if little discretion was left to the respondent.

[49] However, we are of the firm view that the said proposition of law has no application when it involved a wound-up company simply on account that
C once wound up, the management of the company has been taken over by the liquidator. It is trite law that once a company is wound-up, the board of directors is *functus officio* and the management of the wound up company is now by the liquidator (see generally - *Chan & Koh on Malaysian Company Law Principles & Practice*, at p. 969; and *Sri Hartamas Development Sdn Bhd*
D *v. MBF Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436; [1991] 3 MLJ 325).

[50] In this case, the concerned contributory of the plaintiff clearly sought the sanction to enable the plaintiff's company to commence civil proceedings against the defendant. On the part of the plaintiff company such endeavour
E would invariably involve financial implications and in the course of litigation, appropriate decisions would also have to be taken and made every now and then. As far as the concerned contributory is concerned, would that solitary act of applying for sanction falls within the phrase "directly or indirectly take part in the management of the plaintiff company?"

F **[51]** Hence, it begs the issue of the meaning of contributory and its role in the winding up of the company pursuant to the CA, 2016. Section 2 of the CA 2016 defines contributory as follows:

"Contributory", in relation to a company, means a person liable to contribute to the assets of the company in the event of it being wound
G up, and included the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory.

[52] It is not disputed that the concerned contributory was an ex-director and was a shareholder by virtue of her 500,000 fully paid shares (out of
H 2.5 million issued and paid-up shares) holding in the plaintiff's company (see - p. 96, RR). Though fully paid she is still a contributory as defined under s. 2 of the CA 2016.

[53] As a contributory, she can, *inter alia*, apply for stay of the winding-
I up order under s. 492 of the CA 2016, or apply to question the exercise of powers by the liquidator under s. 486 of the same Act.

[54] If she does initiate such an action in court, which will invariably involve some financial implication, the sanction of her trustee, ie, the official assignee, will come into play (see - *Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & 4 Ors* [1995] 3 CLJ 493; [1995] 2 MLJ 709 (FC); and, *Ting Yuk Kiong v. Mawar Biru Sdn Bhd* [1995] 3 CLJ 136; [1995] 2 MLJ 700, where serious court actions were taken by contributories to stay the winding-up order of the respective companies).

[55] But, if she, in her capacity as a contributory, applies to the liquidator, more so the official liquidator (and not to court) *per se* for sanction for the plaintiff company's proposed civil action, it cannot be said that she is involved, directly or indirectly in the management of the plaintiff company on account, as alluded to earlier, that once a company is wound up the entire board of directors (including a shadow director for that matter) will cease and become *functus officio*. And, taking the rider of Ormiston J in *Bracht*'s case, *supra*, the said solitary act of the concerned contributory does not amount to directly or indirectly involved in the management of the plaintiff company.

[56] The entire management and running of the wound-up company is now in the hands of the liquidator. She (the bankrupt contributory herein) will only be involved if invited to by the liquidator for certain purposes as provided in the CA, 2016 or take part in the public examination under s. 503 of the same. It is beyond imagination to say that such involvement will amount to or will be considered as being directly or indirectly involved in the management of the wound-up company.

[57] It must also be noted that once a company is wound up, its entire business ceases immediately except for the beneficial winding up of the company (see - Part II, 12th Schedule of the CA, 2016). In the present appeal, it is not even raised that the concerned contributory was an employee or acting as an ex-director of the plaintiff's company when she applied for the said sanction for the plaintiff's company.

[58] The rule restricting the behavior or action or conduct on a bankrupt (disqualifications and disabilities) are meant for the protection of his creditors' interest and those who are dealing with him so as to maintain the commercial morality of his dealings. In this context, it is apposite for us to note briefly the underlying rationale for such disabilities and disqualifications. In *Khoo's Law and Practice of Bankruptcy in Malaysia*, 2nd edn it is observed, *inter alia*, at p. 1 the following:

> When a person becomes a bankrupt, he obtains protection from legal proceedings by his creditors subject to certain exceptions. However, he is subject to certain disabilities and disqualifications primarily aimed at preventing him from incurring further debts ...
>
> The objective of the bankruptcy process is that, since the debtor is unable to satisfy all his debts, his assets should be shared fairly and equitably among his creditors ...

In *Tan Wee Hun v. Inchape Equatron (M) Sdn Bhd* [1998] 5 CLJ 769 it is further observed:

> The object of the Bankruptcy Act is to protect the public from irresponsible businessmen who transact business when they know they do not have the financial capacity to meet their payment obligations.

[59] Hence, amongst others, a bankrupt is disqualified of being appointed as a company director, and to cease to be a director once declared a bankrupt. To carry on as a director or to directly or indirectly, be concerned with or takes part in the management of the company is an offence under s. 198, of the CA, 2016 (see - *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606).

[60] The above-mentioned activities presuppose that the company the concerned contributory is said to have directly or indirectly taken part in its management must of necessity be a going concern or a solvent company. Here is where *Commissioner for Corporate Affairs v. Bracht* (*supra*) is directly on point. The case is pointedly all about a going concern company or a solvent company. So too in all the cases cited by the defendant where the act of the bankrupt was questioned and impugned.

[61] We would reiterate that even though the concerned contributory is undisputedly an undischarged bankrupt, reading s. 38(1)(d) in the context of its setting, *inter alia* Part II of the BA/SA, 1967, the company in which the concerned contributory is said to be directly or indirectly concerned in or take part in its management must refer to a going concern or a solvent company. Hence, the status of the plaintiff's company as a wound-up company is material and having serious determinative implication on the issue raised by the defendant. It is worth repeating that once a company is wound up, the management, ie, the entire board of directors, is *functus officio*, and the same being taken over by the liquidator. Henceforth, the winding-up company is prohibited from carrying out any business except for the beneficial winding up of the company.

[62] Thus, there is no basis to sustain the defendant's contention that the concerned contributory has no *locus* to apply for sanction for the plaintiff's company. Further, it must be noted that the concerned contributory is not affirming an affidavit nor holding herself out as a director or officer of the company in any affidavit or cause papers to support the plaintiff company's action in court. Thus, the cases cited by learned counsel for the appellant are readily distinguishable.

[63] In the light of the circumstances under which the said sanction was applied by the concerned contributory, the view of the learned trial judge as expounded in para. 10 of his grounds of judgment (at p. 23, RRT) is entirely correct. There is no issue that the contributory has no competency to apply

for the said sanction. She has the competency and she does not have to obtain the prior sanction of the DGI or previous sanction of the DGI. On the facts and law, she had passed the legal threshold to procure the said sanction. The action was proceeded upon a valid sanction.

[64] We opined that the resolution of the principal issue of *locus standi* in favour of the plaintiff had sufficiently disposed of the defendant's appeal. Hence, there is no necessity for us to address the collateral issues ventilated by the defendant.

[65] We equally opined that the learned trial judge's approach in dealing with the issue of *res judicata* is entirely correct. We are on all fours with His Lordship in respect of his findings on this issue as stated in paras. 12, 13, 14 and 15 of his grounds of judgment. We have nothing more to add to the same.

[66] Therefore, we dismissed the defendant's appeal with cost to the plaintiff in the sum of RM50,000 subject to the payment of the allocator fee and hereby affirmed the decision of the learned trial judge.

[67] Correspondingly, the defendant's appeal in Appeal 1978 is struck off with no order as to costs.